IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 995 130

1. EARLE ROBERT BALL; 2. THE HEIRS OF JOHN S. BECKER, deceased; 3. EUGENE C. CALLAHAN; 4. EVERETT T. CROSSAN; 5. ROBERT J. DEEGAN; 6. CHARLES S. FLIPPEN; 7. JOHN GALVIN; 8. WILLIE A. HOPKINS; 9. WILLIAM E. MASON; 10. CHARLES MONTINI; 11. JOHN T. MOYER; 12. HARRY H. MURRAY; 13. RAYMOND JOHN REILLY; 14. LOUIS R. SHIELS; 15. CHARLES E. WEIR, *Petitioners*,

v.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SAMUEL I. SHERWOOD,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioners by their attorney Samuel I. Sherwood, pray that a writ of certiorari issue to review the decision of the United States Court of Claims, entered on January 31, 1956, dismissing their petition for retroactive salary, as Veteran Preference Eligibles employed under the United States Civil Service System.

OPINIONS BELOW

The opinion of the court below (App., *infra*, pp. 1a, 9a) is reported in Vol. 137, No. 2 of the Federal Supplement, dated March 19, 1956 at page 740.

JURISDICTION

The opinion and judgment of the court below (infra., pp. 1a to 9a) was entered on January 31, 1956. On April 30, 1956, the time for applying for a writ of certiorari was extended to May 29, 1956, by order of Mr. Chief Justice Warren, (*infra*, p. 9a). It was again extended by the Chief Justice to June 1, 1956 (infra, p. 10a). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATUTES INVOLVED

The pertinent provisions of the following statutes, are set forth in the Appendix, *infra*, p. 10a: 5 U.S.C. 863; 5 U.S.C. 652(b)(3); 28 U.S.C. 1491; 28 U.S.C. 1346(d)(2); 28 U.S.C. 2501; and 28 U.S.C. 1500.

QUESTIONS PRESENTED

1. Is it mandatory for Federal Civil Service employees who are Veteran Preference Eligibles, to appeal first to the Civil Service Commission from a wrongful reduction in force, in order to recover retroactive salary for the periods of their demotions?

2. Is the Statute of Limitations, 28 U.S.C. 250k, supra, tolled by virtue of 28 U.S.C. 1500 supra, during the pendency of a suit in a U. S. District Court by the petitioners herein, for restoration to the positions from which they were demoted?

STATEMENT

The facts leading up to the filing by the petitioners of their claims before the Court of Claims, are correct as stated in the Opinion of the Court below (App. pp. 1a, 2a, 4a).

The court below stated in its opinion (App. p. 3a) "before a cause of action may be said to have accrued under a statute, it must appear that all statutory requirements have been met." It then went on to state in effect that under 5 U.S.C. 863 (App. p. 10a) the petitioners had to appeal to the Civil Service Commission first in order to meet the statutory requirements. Not doing so, but seeking redress through the U. S. District Court and obtaining the same through a temporary mandatory injunction, it erased their right of recovery of back pay, citing *Goodwin* v. *United States*, 127 C. Cls. 410 (App. pp. 4a, 5a).

The Court of Claims then cited the case of *Carl P. Green* v. *United States*, 124 C. Cls. 186 (App. p. 5a) where Green was restored to duty from a wrongful discharge pursuant to a final mandatory injunction of the District Court. In that case Green recovered his retroactive salary through the Court of Claims on the basis of 5 U.S.C. 652(b)(3) (App. p. 10a). However, the court went on to say that the *Green* case did not help us, inasmuch as in the case of *Gregory* v. *U. S.*, 123 Ct. Cls. 794 (App. p. 5a), the Court of Claims held that section 652 did not apply to demotions but only to discharges.

The fact of the matter is, that the *Gregory* case was one of demotion and not discharge. The court refused recovery on Gregory's position that he was entitled to it under 5 U.S.C. 863, and it further refused the defendant Government's contention that 5 U.S.C. 652(b)(3) restricted recovery to removals and sus-

pensions. The Court stated in that case that 5 U.S.C. 863 was per se and by legislative history a corrective action statute and not a pay recovery one, but that 5 U.S.C. 863 and 5 U.S.C. 652(b)(3) should be interpreted in pari materia, by virtue of their content and their legislative history. Strangely enough however, after interpreting those statutes together in favor of Gregory, the court adjudicated the claim in his favor on the basis of their own previous decisions which preceded 5 U.S.C. 863.

The court below in deciding against us on our contention that 5 U.S.C. 1500 (App. p. 10a) tolled the statute of limitations of 28 U.S.C. 2501, cited *Brunswick Land Corp.* v. *Perkinson*, 153 Va. Rep. 603, 151, S.E. 138, (App. p. 6a) and *Creson* v. *Scott*, 275 S.W. 2d 406 (App. p. 6a). In effect these cases showed that where the same circumstances and parties were involved in two different courts, with the only distinction being that one sounded in tort and the other in contract, that the statute of limitations was not tolled. But neither case fits the circumstances of our case, inasmuch as the petitioners herein could bring action for restoration only in one court and seek recovery of back pay in the other, being statutorily limited.

In the case of *Ylagan* v. *U. S.*, 101 C. Cls. 294, cert. denied 233 U. S. 763 (App. 7a), the circumstances and facts were quite different from the instant case. There Ylagan tried to overcome the statute of limitations by showing his due diligence in turning through the years, from one agency to another, to Congress, to the Postmaster General, to the Civil Service Commission and others, with various claims and complaints, and finally to the District Court, to recover what he deemed was his claim for retroactive salary.

In the case of *Lowery, et al.* v. *U. S.*, 125 C. Cls. 598 (App. 7a, 8a), cited by the court below, the statute of

limitations could not be avoided because, the plaintiffs, firefighters, had elected to sue for money claims in the District Court, hoping to receive more favorable treatment than was accorded the plaintiff in *Conn* v. *U. S.*, 107 C. Cls. 422, cert. denied 332 U.S. 757, cited by the court in its opinion (App. 8a). The *Lowery* case was dismissed in the District Court because it fell within the four corners of the case of *Brauer* v. *U. S.*, 343 U.S. 112, also cited in the court's opinion (App. 8a). Both of these cases were dismissed in the District Court, because of the enactment of the 1951 amendment to 28 U.S.C. 1346(d)(2), which included "employees" as those to be excluded from seeking recovery of money claims for fees and salaries in the District Court.

REASONS FOR GRANTING THE WRIT

On the first question presented, supra, we contend that whether restoration took place as the result of a court order, or from the Civil Service Commission, is immaterial to the accrual of the claims for retroactive salary of the petitioners. The Court of Claims itself in its opinion cited the case of *Carl P. Green* v. *United States*, 124 Ct. Cls., *supra*, where the claim was adjudicated favorably on a Court ordered restoration. Furthermore the *Gregory* v. *United States* case, *supra*, was a reduction in force case, and the claim could have accrued by virtue of the pari materia interpretation by the Court of Claims of 5 U.S.C. 863 and 5 U.S.C. 652(b)(3).

The fact of the matter is, that restoration took place and the words in 5 U.S.C. 652(b)(3) *infra*, which state ". . . after appeal to proper authority, is reinstated . . .", provides the key to show that the statutory requirements are met by the petitioners i.e., they

appealed to the District Court, most certainly, a proper authority.

On the second question presented, supra, we contend that the Statute of Limitations 28 U.S.C. 2501, *infra*, was tolled as the result of petitioners' pendency of suit in the Federal District Court for the Eastern District of Pennsylvania. The statutory requirements for accrual of their claims having been met upon restoration, the statute of limitations was tolled by virtue of 5 U.S.C. 1500, *infra*.

The petitioners had to first effect their restoration in order to meet the statutory requirements for accrual of their claims. They therefore did not "elect" to bring their action in the District Court. They could not seek restorative action in the Court of Claims, because that court does not have that power. They did not seek recovery of their back pay in the District Court, because 28 U.S.C. 1346(d)(2), effectively barred them from that forum for that purpose.

In effect the Court of Claims' decision in the instant case does not follow the law as laid down in *Bruner* v. *United States*, 343 U.S. 112 (App. 8a). In that case, a wage claim was dismissed, by the District Court as the result of the passage of the amendment to 28 U.S.C. 1346(d)(2) on October 31, 1951 (ch. 655, Sec. 50(b), 65 Stat. 727). That amendment added the word "employees" to the statute. The Court of Claims in the instant case, in stating that petitioners herein "elected" to file their action in the District Court, is in effect stating that the District Court had jurisdiction over wage claims, when, in fact the District Court, as per the Bruner decision, did not.

Furthermore, the petitioners could not have brought a wage claim to the District Court in 1948, because

they were barred as "officers", from recovery in that court, by virtue of the enactment of 28 U.S.C. 1346(d)(2) on June 25, 1948, ch. 646, Sec. 1, 62 Stat. 933. That petitioners are officers, is amply supported by the following: *Jentry* v. *U. S.*, D.C. Cal. 1947, 73 F. Supp. 899, where a civilian seaman was determined to be an officer. *Kennedy* v. *U. S.*, D.C. Tax 1944, 54 F. Supp. 446, affirmed 146 F. 2d 26, where a junior instructor of mathematics, was found to be an officer. *Callahan* v. *U. S.*, 1941, 122 F. 2d 216, 74 U.S. App. D.C. 281, a customs service employee.

The law under 28 U.S.C. 1500, is clear and unequivocal. In the case of *Maguire Industries* v. *United States*, Ct. Cls. 1949, 86 F. Supp. 905, the court there said, speaking of 28 U.S.C. 1500, "Renegotiation proceeding of government contracts before the tax courts are essentially 'judicial proceedings', and come within the spirit of this section declaring that the Court of Claims is without jurisdiction of any claim for which plaintiff or his assignee has pending in any other court any suit or process against the United States."

In the case of *British American Tobacco Co.* v. *The United States*, 1939, 89 Ct. Cls. 438, cert. denied 60 S. Ct. 974, 310 U.S. 627, 84 L. Ed. 1398, the interpretation of 28 U.S.C. 1500, is made pellucidly clear, when the court stated, "Where the only distinction between two suits, one instituted in the U. S. District Court against an agent of the United States and the other instituted in the Court of Claims against the United States is that the action in the District Court was made to sound in tort and the action in the Court of Claims was alleged on contract, the facts existing and operating in both cases being the same, the Court of Claims

is without jurisdiction, the case in the District Court having been prosecuted to a conclusion."

See also, *Joyce* v. *U. S.*, Ct. Cls. 1943, 48 F. Supp. 526, 98 Ct. Cls. 427:

"Dismissal of suit against United States to recover income taxes paid was required because of pendency of another suit on the same cause of action against collector of internal revenue acting under authority of United States."

"Purpose of this section was to prohibit the filing and prosecution of the same claims against the U. S. in two courts at the same time." *Frantz Equipment Co.* v. *U. S.*, 98 F. Supp. 579, 120 Ct. Cls. 312.

"Where plaintiff, when it filed its petition commencing suit in Court of Claims had pending in a federal District Court a suit against a former collector of internal revenue based on same claim and such former collector was, at time cause of action arose acting under authority of the U. S. in respect thereto, petition and action in Court of Claims must be dismissed." *N. J. Worsted Mills* v. *U. S.*, 1935, 9 F. Supp. 665, 80 Ct. Cls. 640.

There was no election by the petitioners in bringing their action to the District Court, because it was there that they could effect their actual restoration to the jobs from which they had been demoted. The Court of Claims does not have that authority. However, in seeking actual restoration, they could not, while their suit was pending in the District Court, seek recovery of their claims in the Court of Claims.

For all of the foregoing reasons, petitioners pray that a writ of certiorari, issue from this Court.

SAMUEL I. SHERWOOD,
Attorney for Petitioners.